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OFFICE OF PETITIONS

In re Application	:
Lauffer, et al.	:
Application No. 09/887,706	: DECISION ON APPLICATION
Filed: September 8, 2000	: FOR PATENT TERM ADJUSTMENT
Atty Docket No. MET/7 CON	:

This is a decision on the "APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR 1.705(B)," filed October 6, 2004. Applicants request that the initial determination of patent term adjustment under 35 U.S.C. 154(b) be corrected from three hundred twelve (312) days to four hundred two (402) days.

The application for patent term adjustment is **GRANTED** to the extent indicate herein.

The Office has updated the PAIR screen to reflect that the correct Patent Term Adjustment (PTA) determination at the time of the mailing of the Notice of Allowance is **four hundred one (401) days**. A copy of the updated PAIR screen, showing the correct determination, is enclosed.

On July 9, 2004, the Office mailed the Determination of Patent Term Adjustment under 35 U.S.C. 154(b) in the above identified application. The Notice stated that the patent term adjustment (PTA) to date is three hundred twelve (312) days. On October 6, 2004, Applicants timely¹ submitted the instant application for patent term adjustment, asserting that the correct number of days of PTA at the time of the mailing of the Notice of Allowance is four hundred two (402) days.

Applicants assert entitlement to a patent term adjustment of four hundred two (402) days on the basis that the PTO improperly assessed Applicants a delay of sixty-one (61) days for responding to a Notice of Incomplete Nonprovisional Application mailed on March 29, 2002. Applicants assert that they timely filed a response within the three month period pursuant to 37 C.F.R. 1.704(b), as they filed a petition under 37 CFR 1.53(e) on June 6, 2002.² In addition, Applicants assert that the PTO improperly assessed Applicants a delay of thirty (30) days for filing an amendment after final office action pursuant to 37 C.F.R. 1.703(a)(3). Applicants state their after final amendment was timely filed on September 22, 2003, not November 20, 2003. Applicants also argue that they should not have been assessed delay of thirty-six (36) days for filing an amendment on May 27, 2003; rather they should have only been assessed delay of thirty-five (35) days. Finally, applicants point the Office's attention to the fact that they should have been assessed two (2) days of applicant delay for the filing of an RCE on March 11, 2004, where a Notice of Allowance was mailed on December 9, 2003.

Applicants state that the patent issuing from the application is not subject to a terminal disclaimer.

The Office initially determined a patent term adjustment of three hundred twelve (312) days based on an adjustment for PTO delay of four hundred thirty-nine (439) days pursuant to 35 U.S.C. 154(b)(1)(A)(i) and 37 C.F.R. § 1.703(a)(1), reduced by Applicants' delays of sixty one (61), thirty-six (36), and thirty (30) days pursuant to 35 U.S.C. 154(b)(2)(C)(ii) and 37 C.F.R. § 1.704(b). The adjustments of 61, 36, and 30 days are at issue.

¹ Applicants filed the application for patent term adjustment prior to the filing of the issue fee.

² A decision granting the petition was mailed on August 19, 2002.

The adjustment of 61 days has been found to be incorrect. A review of the application file reveals that a Notice of Incomplete Nonprovisional Application was mailed on March 29, 2002. Applicants timely filed a response to this Notice in the form of a petition under 37 CFR 1.53(e) on June 6, 2002. As this was timely pursuant to 37 CFR 1.704(b), no applicant delay should have been assessed.

The adjustment of 30 days has been found to be correct. A final Office action was mailed on July 21, 2003. Applicants have submitted a copy of a postcard receipt for the instant application, itemizing an amendment and bearing a USPTO date stamp of September 22, 2002. A postcard receipt which itemizes and properly identifies the items which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.³

With respect to Applicants' delay of 36 days, Applicants cite to the Official Gazette Notice dated January 15, 2002, referencing mail delay associated with the dates October 13, 2001 through December 1, 2001. "Applicants respectfully submit that the timeframe for postal delays indicated by the Notice - three business days - is suggestive of the PTO's view of an acceptable postal service delay." Applicants' argument is not persuasive.⁴

Regarding the additional Applicant delay of 2 days, the Office thanks Applicants for their good faith and candor in bringing this matter to the attention of the Office.

In view thereof, the correct determination of patent term adjustment at the time of the mailing of the Notice of Allowance is **four hundred one (401) days** (439 days of PTO delay and 38 (36 +2) days of applicant delay).

The Office acknowledges submission of the \$200.00 fee set forth in 37 CFR 1.18(e).

The application file is being forwarded to the Office of Patent Publication for processing into a patent.

³ MPEP 503.

⁴ See Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term, Comment 10, 1239 O.G. 14 (Oct. 3, 2000).

Telephone inquiries specific to this matter should be directed to Cliff Congo, Petitions Attorney, at (571)272-3207.

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for

Karin Ferriter
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Enclosure: Copy of Revised PAIR Screen